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No. 97-1704

In the Supreme Court of the United States

OCTOBER TERM, 1997

ESTEBAN ORTIZ, ET AL.,
Petitioners

v.

FIBREBOARD CORPORATION, ET AL.,
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Respondents would have the Court believe that this class action is about insurance policies, not asbestos injuries — that it is about the Insurers' liability to Fibreboard, rather than Fibreboard's liability to asbestos victims. This pretense is woven into Respondents' arguments about class certification under Fed.R.Civ.P. 23(a), adequacy of representation under Rule, 23(a)(4), mandatory class treatment under 23(b)(1)(B), and justiciability. Once this thread is pulled, all of Respondents' efforts to defend the judgment below come unraveled.

1. Rule 23(a) Certification. The Respondents have abandoned the opinion below. They make no effort to justify the Fifth Circuit's reliance on a watered-down standard for certification of settlement class actions. See Pet. Br. 10, 13-14.[1] Nor do they deny that the Fifth Circuit certified this class on the basis of issues arising from the settlement itself. Pet. Br. 10, 14-15. Nor do they seek affirmance of class certification here by reference to the issues raised by the legal claims actually pleaded in the class complaint. Rather, they ask for approval of the certification of this class by reference to the very different legal and factual questions raised by *other* causes of action pleaded by *other* parties in *other* lawsuits filed in *other* courts in *other* jurisdictions. Class Br. 24-26. Surely this will not do.

The named plaintiffs pleaded, on behalf of a vast class of exposure-only plaintiffs, supposed state-law causes of action for "fear" and "risk" of future asbestos diseases — claims that Class Counsel admit do not exist as a matter of law and that they never intended to litigate. JA 128a, 129a, 172a-173a, 204a (see discussion at Pet. Br. 5-6, 45). But the settlement approved below releases future causes of action for wrongful death and other genuine asbestos injuries that class members may one day develop — causes of action that rest on an entirely different factual predicate from the pleaded "fear" claims, largely because the future claims, if they occur, will rest on facts that have not yet transpired, such as an individual class member's actual disease or death.

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[1] Citations to Petitioners' main brief will be styled "Pet. Br." Citations to Class Counsel's Brief and the joint Insurers - Fibreboard Brief will be styled "Class Br." and "Ins. Br." respectively.

Rule 23(a)(3) requires that the "claims" pleaded by the class representatives must be typical of the "claims" of the class itself, *Amchem Products v. Windsor*, 117 S.Ct. 2231, 2249 n.18 (1997), yet Class Counsel have forsworn the asbestos tort claims against Fibreboard that they pleaded in the complaint. They instead rely, for certification of this asbestos tort class action in a federal court in Texas, upon *hypothetical* insurance coverage claims that Class Counsel say the class representatives *could have* pleaded — but did not plead — against the Insurers in the state court coverage case in California — litigation to which no member of the class was even a party. There is not even any factual or legal overlap between the asbestos personal injury claims at issue here and the hypothetical insurance coverage claims upon which Class Counsel urge the Court to base certification. But unless Rule 23(a)'s requirements were satisfied specifically with reference to the individual damages claims released by this class settlement, Class Counsel and the class representatives could not properly negotiate *any* alteration of absent class members' rights with respect to those claims.

Thus, the only way to affirm the judgment below is for this Court to abandon the fundamental tenets of class representation, which mandate (1) that the "claims" that are the guidepost to class cohesion be the actual claims raised in an "'actual'" lawsuit, *Amchem*, 117 S.Ct. at 2249 n.18; (2) that the "claim[s]" presented by the named plaintiffs be closely "interrelated" with the "claims" to be litigated or released on behalf of the class, *General Telephone Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982); and (3) that the authority of class plaintiffs to bind absent class members be limited to the common and typical claims pleaded in the class complaint (or to claims arising from the identical facts as those pleaded). *National Super Spuds v. New York Mercantile Exchange*, 660 F.2d 9, 17-19 & n. 7 (2d Cir. 1981); *Grimes v. Vitalink Comm. Corp.*, 17 F.3d 1553, 1563-64 (3d Cir.), *cert. denied*, 115 S.Ct. 480 (1994).[2]

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[2] Respondents caricature this as "the contention that class actions can *never* include future claims." Class Br. 26-27. We urge no such categorical rule. Class actions including future members can be certified with respect to claims for declaratory and injunctive relief because, by the very nature of the relief sought, any decree must bind all similarly situated persons to be effective. *See* cases cited in Class Br. 50 nn. 36 & 37. But this case seeks resolution of individual, future, *personal injury* claims which depend upon the individual circumstances of each class member. *See Amchem*, 117 S.Ct. at 2250. And with respect to exposure-only class members, who constitute most of this "futures" class, such circumstances have not yet arisen. Class representatives cannot act on behalf of absentees in this context.

Class Counsel scramble to repackage their class complaint not as pleading personal injury tort causes of action *against Fibreboard*, but as making claims *against the Insurers* to third-party beneficiary status under the liability insurance policies. Class Br. 21, 24, 25-26 nn. 16 & 17. This fantasy is dispelled by simply reading the complaint: Fibreboard is the only party named as a defendant and the only claims pleaded seek damages for asbestos torts. (CA 560a-564a). The class plaintiffs never allege that they have any rights, as third-party beneficiaries or otherwise, under Fibreboard's insurance policies, nor do they seek a declaration of any such rights. The insurance coverage dispute is mentioned only in reference to the California state court lawsuit between Fibreboard and the Insurers, which is where, according to the class complaint itself, the coverage issues had been pleaded and were being litigated. CA 558a, ¶ 20. Indeed, it was the imminent judicial resolution of those coverage claims against the Insurers in the California case (rather than here) that supposedly created the need for quick settlement, in this case, of the asbestos tort claims against Fibreboard. Furthermore, Respondents admit that no issues relating to the insurance policies were litigated at the settlement fairness hearing in this case. Class Br. 45 n.33. In a remarkable understatement, Class Counsel describe their failure to include in the class complaint the claims that they would now rely upon to certify this class under Rule 23(a)(2)&(3) as a failure to "plead[] artfully." Class Br. 18.

The game is up. By relying exclusively on claims in the entirely separate coverage litigation to which the class was not a party, Respondents admit that the class cannot be certified by reference to "the legal or factual questions that qualify each class member's case as a genuine controversy." 117 S.Ct. at 2249. They repeat the irrelevancy that they "could have" pleaded a different case about third-party beneficiary status and "could have" sought certification of a class on that basis. Class Br. 26 n.17, 45 n.33. But the fact remains that they did not. More important, a class certified

on such a basis, even if cohesive, would be *aligned with Fibreboard* against the Insurers with respect to the coverage dispute. Such a class would still lack the cohesion on legal and factual issues *relating to asbestos claims* that would be necessary to litigate or settle the individual class members' *personal injury claims against Fibreboard*.[3]

Authority to represent an absent class is not dispensed in gross. Class cohesion and hence class certification with respect to one claim does not empower the class plaintiffs to bind the class with respect to any and all claims that individual class members might have against the named defendant. Suppose there were a corporation with thousands of shareholder-employees who currently held or in the future might hold against the corporation a wide variety of tort claims for money damages, including claims for personal injuries in the workplace, fraud, invasion of privacy, violations of retirement and benefit plans, and sex, race, age and disability discrimination. Most of the claims are future claims, not yet ripe, without existing injury but alleging a risk of future harm. We don't know yet who has which claims. But there are common problems affecting all the employees' claims — the corporate directors have absconded with most of the company assets that could be used to pay these myriad tort claims, and the insurance company that issued the officers' and directors' liability policy has disputed coverage, so the only other source of recovery is likewise in jeopardy.

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[3] Even Class Counsel's assertion that exposure-only class members "could have" sued the Insurers under California law for a declaratory judgment respecting coverage of their tort claims against Fibreboard is dubious and contradicted by their own authorities. Class Br. 24 & n.15. Although California law does permit *presently injured* tort victims to sue a tortfeasor's insurance carrier as third-party beneficiaries for a declaration of coverage, "the *injured person's* rights against the tortfeasor's insurer arise upon the happening" of the injury. *Shapiro v. Republic Indem. Co. of Am.*, 341 P.2d 289, 291 (Cal. 1959)(emphasis added); *see also Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937) (to be justiciable, a declaratory judgment action on an insurance policy must involve "an adjudication of a *present right upon established facts*")(emphasis added). Every case Class Counsel cite involved a plaintiff with an existing injury. Here the overwhelming majority of class members have not yet suffered an injury from asbestos exposure and any potential claims they might have against Fibreboard's insurers are therefore not ripe.

Under Respondents' radical reinterpretation of Rule 23, a handful of those employees, pleading only claims that they admit are a pretext and that don't exist under governing law — e.g., claims for fear of future contumacious corporate behavior — would have the power to litigate or settle all the myriad types of money damages claims against the corporation on behalf of the entire class of shareholder-employees, *not* because the class was cohesive with respect to the sham claims pleaded against the corporation or with respect to the actual claims released by any settlement, but instead because (1) the class supposedly shared a common interest in seeing the corporation win a series of lawsuits in another jurisdiction against the directors and against the insurance company, and because (2) the class of shareholder-employees itself could have, but had not, brought a shareholder derivative suit against the directors and the recalcitrant insurance companies. Such a drastically fluid and limitless theory of class representation is wholly alien to Rule 23.

Ultimately, Respondents implicitly concede (as they must) that this class is rife with the same differences among class members that defeated certification in *Amchem*—questions of individual exposure, injury, health history, and state law. Yet they insist that these differences are irrelevant because the Global Settlement does not of its own terms liquidate individual claims for specific sums of money, but instead leaves resolution of those different factual questions to the Trust's ADR process, which will consider such differences "in accord with their demonstrated significance in the tort system." Class Br. 28. This same argument was, of course, made by the settlement proponents in *Amchem*,[4] and it was rejected by this Court. 117 S.Ct. at 2248-50.[5] It profits Respondents nothing to tout the

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[4] See Br. for Petitioners Amchem Products, Inc. *et al.* in *Amchem*, No. 96-270, at 42 ("the disparate legal issues relating to liability, defenses, and damages" that the Third Circuit relied upon in decertifying the class "are irrelevant under the terms of the settlement," which employs an ADR process that "appl[ies] a formula that takes into account the considerations that bear on recovery in the tort system.").

[5] Respondents' reliance on the Trust ADR scheme to render this asbestos class magically uniform is misplaced for another reason: leaving the effect of the vast variations within the class to be determined by the ADR process does not eliminate those differences — it merely delays their resolution. We have no

ADR process in this settlement as supposedly more fair than that in *Amchem* (Class Br. 28 n.18), because class cohesion — not the settlement's fairness — is the issue.[6] The certification inquiry focuses on the legal or factual questions "that preexist any settlement," 117 S.Ct. at 2249, because the class must be cohesive at the front end, *before* the settlement deal is cut. Class Counsel ignore the fundamental lesson of *Amchem*: If the class can be certified only by relying on the settlement to eliminate the differences among class members that would otherwise defeat commonality and typicality, then it follows that the class was not sufficiently cohesive to allow a settlement to be negotiated in its name in the first place.

2. Rule 23(a)(4) Conflicts. Class Counsel's responses confirm not only that the class was beset by disabling conflicts, but that Class Counsel themselves harbor disturbing and dangerous notions of "adequate" representation. For example, although this Court in *Amchem* deemed "significant" and "salient[]" the inherent conflict between "currently injured" and "exposure-only" class members over "allocation decisions designed to confine compensation," 117 S.Ct. at 2251, Class Counsel disparage conflicts over allocation of settlement funds as "trivial" fights over "tangential" or "theoretical" "side issues." Class Br. 33, 35, 32. Currently injured class members seeking adequate representation are brushed off as "special

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idea how Respondents' supposedly omniscient Trust will resolve individual claims for particular asbestos injuries because, unlike *Amchem*, the settlement here does not even specify a general range of awards for injuries. We are baffled as to why Class Counsel think it better to have a settlement that provides class members with *less* information about how much their claims will be worth under the settlement and that provides *fewer standards* to limit the discretion of those who will control the Trust ADR process.

[6] Although the Questions Presented concern class certification under Rules 23(a) & (b), Respondents oddly devote a lot of space to comparing settlements, see Class Br. 18, 20-23, and they begin and end their briefs by arguing that the Global Settlement is "fair under Rule 23(e)." Ins. Br. 50; *see also id.* at 1-2, 21, 22, 30, 41; Class Br. 3, 16, 20-23, 28 n.18. The Court should reject this invitation to make an "appraisal[] of the chancellor's foot kind—[a] class certification[] dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Amchem*, 117 S.Ct. at 2248.

interests." Class Br. 32. And class members afflicted with mesothelioma or other fatal, asbestos-induced cancers, for which multi-million dollar judgments are familiar, and who therefore are severely prejudiced by the settlement's arbitrary limit of $500,000 on compensatory awards, are dismissed as "unknown and unidentifiable" class members with whom Class Counsel cannot be bothered. Class Br. 34. Such attitudes bode ill for adequacy of representation, because the vast majority of this "futures" class consists of just such "unknown and unidentifiable" asbestos victims.

To take the first point, the conflicts between current and future victims over allocation of the settlement fund were not deemed "tangential" or "trivial" in *Amchem*, and the supposedly limited nature of the "fund" here only makes the problem worse. 117 S.Ct. at 2251. Respondents have previously conceded that a conflict is created by the settlement's allocation of funds to preserve money for late-arriving claimants, see citations at Pet. Br. 20, and Class Counsel's brief again confirms that, in a "limited fund" case, there is "a substantial degree of tension within the class" between current and future plaintiffs. Class Br. 35. Similarly, Respondents criticize the Trilateral Settlement because, without the Global Settlement's restrictions limiting recoveries, there's a risk that "late-comers" will be left without compensation. Class Br. 14. That proves the very conflict upon which this Court based decertification in *Amchem*.

Having recognized the existence here of the very conflict this Court deemed fatal to class certification in *Amchem*, Respondents repeat their prior argument that the class's supposed "common interests" in a settlement "outweigh the differences over allocation" of recovery under that settlement. Class Br. 35. Class Counsel repeatedly chant that the Global Settlement is of "overriding common concern" to the class and that this justifies ignoring any conflicts within the class. Class Br. 31, 32, 33. We are re-plowing old ground here: The desirability of the settlement and its overall fairness to the class may be grounds for approving it under Rule 23(e) if one reaches that point, but they do not warrant certification of a divided class under Rule 23(a)(4). Even if we were to assume arguendo that the settlement is a good deal "'that serves the aggregate interests of the entire class, . . . adversity among subgroups'" would still mandate subclasses and separate

representation before a court could certify the class, let alone approve the settlement. *Amchem*, 117 S.Ct. at 2251.

Class Counsel next argue that the "impending appeal in the coverage litigation" created a "sense of urgency" to settle the case before the appeal could be heard, and that the "injection of subclasses" to address the conflicts would have upset the negotiation timetable. Class Br. 31-32. What kind of rule of law is this — if you're in a hurry, adequacy of representation doesn't count? Respondents offer neither precedent nor principle that would justify dispensing with the requirements of Rule 23(a)(4) when the proponents of a settlement hasten to resolve, supposedly at the last minute, a dispute that has been in litigation for years. If anything, the parties' rush to judgment "warrant[s] more, not less caution on the question of certification;" Rule 23's specifications "demand undiluted, even heightened attention in the settlement context." *Amchem*, 117 S.Ct. at 2248 & n. 16.[7]

The hollowness of Class Counsel's appeal to supposed exigency is revealed by their general plea that *Amchem's* rule requiring subclasses be relaxed lest it "invalidate virtually every class action settlement." Class Br. 34. Respondents fear that Rule 23(a)(4) will be read to deem single, class-wide representation inadequate whenever, as is often the case, "different factions of the class . . . have differing interests concerning the allocation of damages" under a settlement. Class Br. 34. They're beginning to get the point: Adversity among subgroups *means* that the class can't be bound by a settlement unless the subgroups receive separate representation. 117 S.Ct. at 2251. That's as it should be — and it certainly doesn't

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[7] The rush to judgment in August 1993 is hard to understand from the circumstances alone. The California coverage litigation that supposedly compelled haste was 14 years old, and negotiations on a global settlement had been underway since 1990. The necessary subclasses could have and should have been established as soon as global negotiations began. The imminent appellate oral argument was not the first milestone in the litigation (the trial court issued rulings against the Insurers from 1985 to 1990), nor would it be the last, since the case was only in the intermediate appellate court. We understand why the settlement suited the agendas and interests of the Insurers, Fibreboard and Class Counsel (including their 45,000 inventory clients). But those interests cannot justify diluting adequacy of representation when the absent class members — the only ones not at the negotiating table — needed it the most.

doom settlements. It merely requires subclassing and separate representation before classes are certified and settlements negotiated.

Class Counsel also predict that requiring subclasses for adverse groups will doom most 23(b)(1)(B) class actions because "the very predicate" of such limited fund actions — "that the winners of a race to judgment would inequitably prejudice the interest of others — would simultaneously be grounds for a disabling intraclass conflict." Class Br. 36. They are correct that, as this Court noted in *Amchem*, the antagonism among subgroups over allocation of a settlement is sharper in a limited fund context. 117 S.Ct. at 2251. But this fact, and vigorous application of Rule 23(a)(4), do not imperil unitary resolutions under Rule 23(b)(1)(B) in appropriate circumstances — *so long as groups with competing interests are subclassed and separately represented.* This is hardly a radical or unworkable requirement. In bankruptcy proceedings to divvy up the assets of an insolvent debtor, for example, different types of creditors are segregated into subgroups, with separate representation on the creditor committees, and approval of a bankruptcy plan requires the consent of the several committees.

Respondents' final plea is that the disabling conflicts here "cannot be a reason to throw out the entire Settlement." Class Br. 37. But, at the risk of repetition, the issue before the Court is *not* the approval of the Settlement but the class *certification.* If the class is riven by conflicts, it must be decertified. The parties are then free to try to start over. Moreover, even the "central decision of whether to settle for the proffered amount," Class Br. 33, was infected here by disabling conflicts between those inside and outside the class. The class was gerrymandered to exclude Class Counsel's own clients so that they could get a better deal.[8] Class Counsel's representation of the class was impaired by their duty to their 45,000 prior inventory

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[8] We are told that the exclusion from the class of Class Counsel's own clients who separately settled with Fibreboard is not gerrymandering, but "simply a function of the *parties' definition* of what were settled cases." Class Br. 41 n.30 (emphasis added). That's precisely our point: The class definition that excluded their own inventory of clients was not a fact of nature, but a definition manipulated by Class Counsel to the advantage of their own clients. Petitioners objected below to this separate treatment for Class Counsel's own clients (CA 117a-118a, 142a-145a) and also raised the issue in the petition for certiorari as one of several disabling conflicts. Cert.Pet. 8, 14 n.7.

clients who were competing for the same dollars[9] and whose recovery under their own separate settlements was contingent on a Global Settlement for the class.[10] And Class Counsel don't even try to dispute that they sold class members' opt-out rights when the Insurers agreed to pay more for a mandatory class action. See Pet. Br.26-27.[11]

3. Rule 23(b)(1)(B). Respondents have expressly abandoned their prior arguments for certifying this class under (b)(1)(B) as a limited fund class action, even though they concede that was the basis for the judgment below. Ins. Br. 29. They make no effort to dispute the facts that: (1) No matter how Fibreboard and its various

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[9] Class Counsel do not even try to distinguish the authorities holding that class counsel may not concurrently represent clients suing outside the class. See Pet. Br. 22 & n.18.

[10] Class Counsel assert that they owed no further duty to their inventory clients once the inventory settlements were made, even though half of the money due under those settlements was contingent upon achieving a Global Settlement for other parties (the class here). Class Br. 39 n.28. They could not be more wrong. First of all, those claimants in all likelihood continued to be clients of Class Counsel, both in the sense that they expected to receive contingent settlement payments through their lawyers and in the sense that those lawyers continued to represent the claimants with respect to claims against other asbestos defendants. Secondly, even if the representation really did terminate for some clients upon reaching those contingent settlements, ABA Model Rule of Professional Conduct 1.9(a) prohibits future representations that are materially adverse to a former client unless the former client consents, and here the duty to the class to get a great settlement or not to settle at all was adverse to the interest of the inventory clients in getting the second half of their own settlements, which Class Counsel could ensure only by agreeing to a settlement — any settlement — with Fibreboard and the Insurers.

[11] Finally, Class Counsel insist that the conflict between pre-1959 and post-1959 asbestos victims was eliminated, not by the terms of the Settlement itself, but by other understandings between the Insurers and Fibreboard. Class Br. 37-38. But they do not deny that discriminatory treatment of these groups persisted thereafter even in Class Counsel's own inventory side-deals. See Pet. Br. 21 n.17. Moreover, many months after this disparity is supposed to have been eliminated, Class Counsel pleaded in the class complaint (September 1993) that, despite prior agreements, the post-1959 victims were not covered by Fibreboard's insurance policies. CA 559a, ¶23. This belies Class Counsel's post hoc attempts to paper over this disabling class conflict.

assets are considered, there simply is not a limited fund here (see Pet. Br. 23-25, 28-31); and (2) The settlement fund was contrived by the Respondents in order to suit the corporate goals of the Insurers and Fibreboard, and certification as a mandatory (b)(1)(B) class was bought and paid for by the Insurers in order to strip class members of the opt-out rights that would have inconvenienced the Insurers' actuarial forecasts of future liability. Pet. Br. 25-28. Therefore, the judgment below must be reversed unless the Respondents can persuade this Court to accept new grounds for mandatory class certification.

Respondents profess bewilderment as to the source of the notion that, in class actions for damages where the fear is that the defendant will run out of assets, (b)(1)(B) requires a limited fund. Ins. Br. 27. But "limited fund" analysis of mandatory classes is well settled. See Pet. Br. 28. The Insurers themselves were the first to propose certification expressly as a limited fund class; indeed, that was the *sole* basis on which they sought (b)(1)(B) certification in their original pleading.[12] That was likewise the sole basis on which (b)(1)(B) certification was sought in the class complaint. CA 558a ¶18. Accordingly, the Fifth Circuit expressly and repeatedly held that certification of this class turned on the existence of a "limited fund." CA 73a, 74a, 75a, 77a. In the courts below, Respondents couldn't settle on a single theory for mandatory class treatment, see Pet. Br. 23-24 & n.21, and apparently they are still shopping for something that will sell.

The Respondents invoke other types of mandatory classes mentioned as examples in the Advisory Committee Notes to Rule 23. Ins. Br. 28. But we have already distinguished those: Unlike this case, they involved either injunctive relief, which by its nature necessarily operates upon the entire class affected by a defendant's conduct and therefore requires a mandatory class-wide resolution,[13] or the division of property already held in common by the members

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[12] See JA 527a-529a (letter to the court); Intervenors' [Continental & Pacific] Answer and Counterclaims Pursuant to Rule 24 (Sept. 9, 1993) at ¶15.

[13] See Pet. Br. 23 n. 20, 31 n. 26.

of a pre-existing, voluntary association of some sort.[14] Those cases provide no precedent for certifying a mandatory, nationwide class of widely varying, future, individual, *in personam* claims for damages for asbestos personal injuries.

Unable to find precedent for this class action in the Advisory Committee Notes or elsewhere in the history of Rule (b)(1)(B), Respondents nevertheless insist that the circumstances of this case fit within the language of the Rule. They are mistaken. Rule 23(b)(1)(B) permits a mandatory class if:

> the prosecution of separate actions by . . . individual members of the class would create a risk of adjudications with respect to individual members . . . which would as a practical matter be dispositive of the interests of other members . . . or substantially impair or impede their ability to protect their interests.

We are told that "failure by the class to file and maintain a class action to resolve the coverage disputes on a unitary basis . . . would have put class members to the 'significant risk' that Fibreboard would lose its claimed insurance as a result of the coverage disputes." Ins. Br. 25. This makes no sense.

First, even if the supposed need to file "a class action to resolve the *coverage disputes* on a unitary basis" could justify certification of some other hypothetical class action, it could never justify certification of *this* class action because, as demonstrated above, page 3, *this* class action pleads and seeks resolution only of the class's individual *tort claims against Fibreboard*, *not* of Fibreboard's claims under its policies with the Insurers.

Second, the "prosecution of separate actions" by individual class members did not "create" the "risk" identified by Respondents as justifying this non-opt-out class. The risk they point to is the risk that Fibreboard might end up with no insurance to pay claimants. But a 14-year-old insurance lawsuit in California between

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[14] See Pet. Br. 29 n.23. The only new case cited by the Respondents, *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), Ins. Br. 28, falls into this same category. It was a suit seeking reorganization of a fraternal association, where any decision would necessarily bind all the members of that pre-existing, voluntary association, which already held in common the property (mortuary and other benefit funds) under dispute.

Fibreboard and its Insurers created that risk, which existed whether class members prosecuted their tort claims separately or together.[15]

Respondents next argue, for the first time in the long history of this case, that any separate tort suit against Fibreboard "could have itself resulted in an adjudication that the insurers owed no coverage" if the individual plaintiff "sought to have Fibreboard's liability paid by the insurers," because they would have "defended on the ground that they owed no coverage to Fibreboard." Ins. Br. 25. Such an individual "adjudication in favor of the insurers," Respondents contend, would "conclud[e]" the matter with respect to other asbestos plaintiffs. Ins. Br. 25-26. But of course they are wrong. No other plaintiff who was not a party to that individual adjudication would be bound by it.[16] Therefore, the plain language of Rule 23(b)(1)(B) could not be met here, because there was simply no risk that a loss on the coverage issue in a suit by one class member would "be dispositive of the interests of other members of the class."[17]

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[15] The only thing that would eliminate the risk of coverage loss would be a settlement of that California lawsuit. The proposition that the Insurers would not settle that suit unless all future claimants were simultaneously locked into a settlement of their tort claims against Fibreboard — assuming arguendo that was so — was likewise not a risk created by individual lawsuits (as required by Rule 23(b)(1)(B)), but was simply a function of the Insurers' negotiating posture, dictated by *their* economic interests, *not* those of the class. In any event, given the obvious incentives driving both sides to settle, it is fantastic to suggest that the Insurers couldn't settle the coverage dispute without also settling all future tort claims against Fibreboard. After all, the Trilateral Settlement, by its own terms, *does* settle the insurance dispute independently without resolving the class members' tort claims.

[16] "It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979); *see also Blonder-Tongue Laboratories v. University of Illinois*, 402 U.S. 313, 329 (1971).

[17] Moreover, even if it were true that prosecution of any separate tort suit would have had such dire consequences for the class, that "risk" could not sustain certification of this gerrymandered class, because Respondents admit that they excluded "'present' asbestos claimants" from the class (Ins. Br. 30 n.*), and separate adjudication of those claims would create the identical risk supposedly feared by Respondents.

However, if the class member *won* on the coverage issue, the *Insurers* might well be bound on that issue with respect to the entire class, since the Insurers *would* have had a full opportunity to litigate.[18] "This means that each case is essentially a test case for the defendant but not for the claimants who are not parties. The result is a great disparity in litigating risks." Fleming James & Geoffrey Hazard, CIVIL PROCEDURE §11.24 at 634 (3rd ed. 1985). Thus, separate adjudications posed no risk to the class *but did pose an enormous risk to the Insurers*. The "unitary resolution" so desperately sought by the Insurers was "necessary" not to protect the class, Ins. Br. 35, but to protect *themselves*. See Pet. Br. 26-27.

Plainly, that is not a basis for shanghaiing hundreds of thousands of future tort victims into a mandatory class action in order to strip them of their rights under state law. Both Class Counsel and the courts below (CA 82a) previously admitted that the whole point of the mandatory class here was to abridge and "limit[] class members' rights to obtain immediate and full payment of their individual state-law claims." Class BIO 20; see Pet. Br. 33. Yet Respondents now profess never to have heard of the common law rule of "first in time, first in right," under which tort judgment creditors may collect in full, regardless of the interests of other future tort claimants against the same defendant. Ins. Br. 40 n.*; Class Br. 36 n. 25. It is established law that "if a plaintiff recovers judgment and obtains execution against defendant's property, another person having a claim against defendant may not contest the property transfer effectuated by the execution" — "except, for example, when a bankruptcy proceeding may be used to set aside such a transfer." James & Hazard, CIVIL PROCEDURE §11.23 at 631.[19] Abridging the state-law rights of tort judgment creditors by use of a Rule 23 (b)(1)(B) class violates the Rules Enabling Act.

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[18] *See Parklane*, 439 U.S. at 328, 331; *Blonder-Tongue*, 402 U.S. at 328-29; RESTATEMENT (SECOND) OF JUDGMENTS §29.

[19] *See also* CORPUS JURIS SECUNDUM, INSURANCE §1697 Multiple Claims; Priorities and Settlements (1993)("Where there is no statutory provision which is applicable and there is no pro rata provision in the [insurance] policy, the contest of multiple plaintiffs for the limited assets of a common uninsured defendant is generally solved in terms of chronological priority, that is, first in time, first in right."). See cases discussed at Pet. Br. 32 & nn. 28-29.

Respondents contend that we face a "heavy burden" to show "that an intended application" of a federal rule would be invalid under the Rules Enabling Act. Ins. Br. 34. Their argument begs the question because the employment of Rule 23(b)(1)(B) in the circumstances of this case is *not* an "intended application" of that Rule at all. First, (b)(1)(B) was never intended to be a means of collectivizing individual mass tort claims on the supposition of the defendant's future insolvency. See Pet. Br. 28-31 & n. 27. Second, Respondents have offered nothing to show that the drafters of the rule intended to create a revolutionary — and profoundly *in*equitable — form of pseudo-receivership in which the debtor's assets are left untouched while those creditors whom the debtor has injured most grievously are forced to bear the entire brunt of a *pro rata* cram-down. See Pet. Br. 34-36.

Respondents do not dispute either of these points directly. Instead they offer a medley of out-of-context snippets culled from inapposite equity cases dating back to the 17th century. Ins. Br. 34-41. Many of these cases are the same ones they cited in their briefs in opposition, which we have already distinguished. See Pet. Br. 28-29 n.23.[20] Much of the "authority" is so generic as to be meaningless — as in the frequent quotations supposedly suggesting that collective treatment of claims is appropriate whenever it would help "'to

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[20] Respondents' own principal authorities establish that both common law and equity historically refused to permit one party to bind absentees with respect to individual damages claims unless all such claims were asserted against a common fund. Using one of Respondents' key cases, *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), as an illustration, Prof. Chaffee (upon whom Respondents also rely) explained the "cardinal principle of such class suits": absentees may be bound only if "connected similarly with land or money within the jurisdiction . . .[But] if the unjoined persons have special claims or liabilities, their rights are personal and can not be concluded in their absence." Zechariah Chafee, SOME PROBLEMS OF EQUITY 164-65 (1950). All of the early cases upon which Respondents rely confirm this "cardinal principle."

Unlike Prof. Chaffee, Respondents fail to distinguish the joinder device of the "bill of peace" — which is analogous to a consolidation under Fed.R.Civ.P. 42 — from the radically different class action device. See Ins. Br. 37 n.** (citing Chaffee but failing to reveal that his analysis referred to bills of peace and *not* to class actions). The critical distinction is that a bill of peace had no *res judicata* effect on parties who did not actually appear personally in the proceeding.

prevent a failure of justice.'" Ins. Br. 36, 37 & n.**.[21] All of this leads up to Respondents' breathtaking assertion that the certification of a non-opt-out class consisting of hundreds of thousands of unidentifiable, future mass tort victims with individual personal injury claims is authorized by "almost 150 years of unbroken prior precedents" (Ins. Br. 41) — or, better yet, that it is "established by centuries of jurisprudence." Ins. Br. 35. This is preposterous. Even the district court below admitted that the certification of this case under 23(b)(1)(B) was an untried "novelty" that the court was determined to pioneer. CA 186a. In more candid moments in that court, the Respondents likewise described this class action as "unprecedented." JA 579a.

It is unprecedented largely because the problems of asbestos defendants threatened with a future stream of tort liabilities have previously been handled through bankruptcy.[22] The Respondents do

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[21] Although Respondents concede that equity allowed mandatory disposition of the rights of absent parties *only* when the parties held property in common and shared a "pre-existing jural relationship," they insist that those circumstances exist here. Ins. Br. 38. We are told that hundreds of thousands of unknowing, unidentified future asbestos claimants, who may one day have individual personal injury claims against Fibreboard, have the same pre-existing jural relationship with one another as do the voluntary members of a religious society who owned, in common, certain pre-existing property generated by the voluntary contributions of the society's members. *See Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 298, 303 (1853). Ins. Br. 38. Merely to state such propositions is to explode them.

Respondents insist that the class is bound together by "[t]his action" itself, "in which they seek to resolve their rights of ownership of the proceeds of [Fibreboard's] policies." Ins. Br. 38. (1) This is circular reasoning: if all that were required to unify a class were the inclusion of its members in a proposed class action, there would be no limit to the rule's application. (2) This action does not, in fact, plead any claim against the Insurers or any claim to rights of any kind under the policies; it alleges only tort claims against Fibreboard. (3) The uninjured class members who constitute most of the class have no pre-existing "rights of ownership" to the policy proceeds; indeed, they do not even have a ripe claim to a declaration of their potential future rights under the policies.

[22] Indeed, Class Counsel went on record early in this case as adamantly opposed to the abuse of (b)(1)(B) to circumvent the requirements of the Bankruptcy Code. JA 559a-560a. Class Counsel's opposition stopped only

not deny that there are special provisions in the Bankruptcy Code tailor-made for asbestos defendants and future plaintiffs. See Pet. Br. 38.[23] They do not deny that bankruptcy law is far more protective of the interests of absent, future tort claimants than is Rule 23(b)(1)(B). See Pet. Br. 37 & n.35. Nor do they deny that the courts below self-consciously employed Rule 23 to circumvent the bankruptcy laws because the courts deemed themselves empowered to judge Congress's handiwork inadequate.[24]

Respondents' defense of the Fifth Circuit's evasion of the bankruptcy laws rests, in their own words, on "one central fact: class members could not have put Fibreboard into bankruptcy in August 1993, when the Global Settlement was reached." Ins. Br. 31. But that "fact" is dubious and the choice of date is entirely self-serving. What makes August 1993 the magic moment? The

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when, according to their own sworn deposition (JA 114a) — which they have never disputed — the Insurers took out their "checkbook." See Pet. Br. 27.

[23] Respondents suggest that this special bankruptcy relief was unavailable to them because 11 U.S.C. §§524(g) & (h) were enacted after the Global Settlement was reached. Ins. Br. 33. That is misleading. By the time those asbestos provisions were enacted in 1994, the device they set forth, originally crafted by bankruptcy judges, had been in use for a decade in asbestos bankruptcies. The 1994 amendments were adopted expressly to codify that device. *See* 1 REP.NAT'L BANKR.REV.COMM'N 319-320 (1997); H.R.Rep. No. 835, 103d Cong., 2d Sess., 40-41 (1994). Fibreboard was well aware of that mechanism: While it was arranging this class action to circumvent bankruptcy in August of 1993, Fibreboard, as a member of an organization called the Committee for Equitable Compensation, vigorously opposed enactment of the 1994 asbestos amendments. *See The Need for Supplemental Permanent Injunctions in Bankruptcy: Hearing Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. 30, 41 (1993).

[24] Respondents' reliance on 11 U.S.C. §305(a)(1) is wholly misplaced. That section allows abstention in favor of voluntary, out-of-court, private reorganization and debt resolutions (Pet. Br. 37-38), whereas this case involves the use of a federal court to foist a mandatory class action upon hundreds of thousands of unknowing, unidentifiable, unconsenting absent class members. Every §305 case cited by Respondents involved not a mandatory mass tort class action, but a voluntary private agreement wherein all the creditors were identified, all had an opportunity to participate personally, the agreement was approved by all participating creditors, and all the debtor's assets were at issue. See Ins. Br. 32 n.**.

negotiations for this settlement began in *1990* (CA 291a-293a) and, although it is a fact Respondents would prefer to duck, the California court conducting the insurance coverage litigation expressly found that, during this period, plaintiffs indeed had the power to "place Fibreboard in involuntary bankruptcy rather than accept deferred settlements." JA 486a, 489a. Respondents themselves confirmed this fact in the formal class notice documents. JA 878a-879a. So involuntary bankruptcy was an option after all.

Furthermore, bankruptcy was an option that Fibreboard itself could always initiate, just as it initiated this global settlement alternative when it approached Class Counsel in 1990. CA 293a. The fact that bankruptcy threatened Fibreboard's avowed goal of resolving all future asbestos claims without touching any of its shareholders' equity certainly *explains* why Fibreboard recoiled from bankruptcy in favor of the mandatory class action that it managed to coax out of the district court below. But it hardly *excuses* that circumvention of the law.

The Respondents contend that this case opens no door to widespread evasion of the bankruptcy laws because the supposedly unique circumstances that justify this class action will never be replicated. But affirmance of the decision below would not be some sort of restricted railway ticket, good for this day and train only. As the Second Circuit warned in *Keene Corp. v. Fiorelli*, 14 F.3d 726, 732 (2d Cir. 1993), adoption of such a perversion of Rule 23(b)(1)(B) "would surely lead to further evasion of the Bankruptcy Code as other debtors sought relief in mandatory class actions."[25]

4. Due Process Right to Opt Out. Respondents contend that the opt-out right for claims for money damages guaranteed by *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), is inapplicable here because "the gravamen of this action is for quintessentially 'equitable relief.'" Ins. Br. 44 n.*. That assertion is contradicted by the complaint itself. See Pet. Br. 31-32, 40. They also contend that *Shutts* does not apply when the class needs a

[25] "We are dubious that a limit to unknown plaintiffs is feasible," and such relief would be applicable to "trade creditors" of a company "deemed to be a limited fund because of insolvency." *Keene*, 14 F.3d at 732. "Certainly the theory pressed here would apply to many products liability cases." *Id.*

unitary resolution of the claims alleged. Ins. Br. 42-43. But, as shown above, the separate prosecution of the class members' tort claims presented no risks to the class, although it would have dashed the Insurers' corporate goal of "total peace." That is why the Insurers, by their own admission, chose "to pay more money" to morph this action from a (b)(3) opt-out class into a (b)(1)(B) mandatory class. See Pet. Br. 26-28. Surely due process protection for absent class members is *more* important, not less, when the defendants admit that they "paid for" the class's opt-out rights.

Finally, Respondents argue that *Shutts'* principles of personal jurisdiction do not apply here because this is a federal court, and "the Constitution permits federal courts to assert personal jurisdiction nationwide." Ins. Br. 43 n.*. But this is not a federal question case, and no federal statute authorizes nationwide jurisdiction here. This is a diversity case in which the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), mandates the application of state-law rules of personal jurisdiction. Respondents do not even try to rebut this proposition, which mandates the decertification of this class with respect to all class members lacking contacts with Texas — that is, the vast majority of the class.

5. Notice. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950), involved the adjudication of "small interests" belonging to absent class members, most of whom could be identified and served notice. The class members had no "individual interest" in "stand[ing] alone" in litigation, but only "shared" interests in a commonly held trust fund. *Id.* This Court held that, "under such circumstances," the risk "that notice might not actually reach every beneficiary" was "justifiable": Although "[n]ow and then an extraordinary case may turn up," in more routine instances the law "has to take some chances" that a few absent individuals won't receive notice. *Id.* This is that extraordinary case, and the question presented is whether it is necessary — and just — to "take chances" with the individual personal injury and wrongful death claims of hundreds of thousands of unidentifiable absent class members, when the only reason the class has been herded into a premature, mass resolution of future claims is that doing so serves the *defendants'* interests. We think not.

6. Justiciability. Class Counsel admit that the claims in the complaint are a sham and were not pleaded in good faith. See page 1 supra. They concede that the complaint pleaded individual damages claims "not to recover individual damages," but to set up a Trust ADR process to pay future claims. Class Br. 48. They concede that the exposure-only class members have suffered no injury in fact sufficient to confer standing to bring tort claims, but insist instead that the requisite "injury" was the "continuation of the coverage disputes." Class Br. 18-19. They assure us that this class "insurance injury" is not "hypothetical," because it was "actually being litigated" — *by other parties in another jurisdiction* — "at the tim of the filing of this action." Class Br. 43. Class Counsel do not explain how that could possibly bootstrap standing for the plaintiff class in *this* case. They assert that the "class members had a cause of action under applicable California law to sue to protect their interests under Fibreboard's insurance policies," Class Br. 48 n.35, but no such cause of action was pleaded here, nor was such declaratory relief sought. See supra page 3. And no such cause of action exists under California law for *uninjured* future tort victims. See supra page 4 n.3.

To Respondents, justiciability requirements are evidently just a charade. Proceeding in that spirit, the courts below invaded the prerogatives of both Congress and the state legislatures by enacting the Respondents' negotiated tort reform proposal.

CONCLUSION

The judgment below should be reversed and the case remanded with instructions to decertify the class and to dismiss the action for lack of a justiciable controversy.

Respectfully submitted,

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